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In The

Supreme Court Of The United States

October Term, 1992

STATE OF CONNECTICUT, *Petitioner,*

v.

KARIN APARO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTIONS PRESENTED

I. Did the Connecticut Supreme Court err in extending the principle of collateral estoppel to the retrial of a mistried count, where at the original trial on a two-count information the jury, while acquitting the respondent on one count, failed to reach a verdict on the other count?

II. If the principle of collateral estoppel is applicable following a mixed result of acquittal and jury deadlock, does it preclude the state on retrial of the mistried count from using evidence which was proffered at the first trial?

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF CONNECTICUT,
Petitioner,

v.

KARIN APARO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Connecticut, entered in this proceeding on August 11, 1992.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 223 Conn. 384, 614 A.2d 401 (1992) and is reprinted in the appendix to this petition at pp. A1 *et seq.*, *infra*.

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JURISDICTION

The judgment and opinion of the Connecticut Supreme Court were entered on August 11, 1992, remanding the case to the lower court with direction and order for retrial. The motions of the parties for reargument and/or reconsideration were denied on September 17, 1992.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257. The challenged decision is a final judgment within the meaning of 28 U.S.C. §1257(3). The questions raised in this petition fall within the category of final judgments which includes "those situations where the federal claim has been finally decided . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 481 (1975). The record shows that the judgment of the Connecticut Supreme Court fully adjudicated the rights of the parties on the issues before it in this criminal case, and that adjudication is not subject to further review by a state court. *Department of Banking v. Pink*, 317 U.S. 264 (1942).

The important federal questions raised in this petition will be effectively unreviewable after the retrial. Should the petitioner obtain a conviction of the respondent on retrial, its claims will be moot. Should the respondent be acquitted on retrial, the petitioner will be precluded by principles of double jeopardy from pressing its federal claims on appeal. *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984); *California v. Stewart*, 383 U.S. 436, 498 n.71 (1966).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section I:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes Section 53a-8:

Criminal liability for acts of another. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the prinicipal offender.

Connecticut General Statutes Section 53a-48(a):

Conspiracy. (a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

Connecticut General Statutes Section 53a-54a(a):

Murder. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception' except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be,

provided nothing contained in this subsection shall constitute a defense to prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

STATEMENT OF THE CASE

The respondent, Karin Aparo, was arrested following a homicide investigation by the Glastonbury, Connecticut Police Department and the Connecticut State Police into the death of Joyce Aparo, the respondent's mother. Dennis Coleman, the respondent's former boyfriend, confessed to killing Joyce Aparo and implicated the respondent in the crime. She was charged with one count of murder as an accessory, in violation of Connecticut General Statutes §§53a-54a(a) and 53a-8; and one count of conspiracy to commit murder, in violation of §§53a-48(a) and 53a-54a(a).

The resondent entered pleas of not guilty and was tried before a jury of twelve. The evidence at the lengthy trial is set forth in detail at pages 393-401 of the Connecticut Supreme Court's opinion. The state's case against the respondent consisted primarily of the testimony of Dennis Coleman, substantiated in part by physical exhibits including correspondence, and by the testimony of two of the defendant's friends. The jury found the respondent not guilty on the charge of accessory to murder, but was

unable to reach a verdict on the conspiracy count. Accordingly, the trial court entered a judgment of acquittal on the accessory charge, and declared a mistrial on the conspiracy count.

Following the state's declaration of its intent to retry the respondent for conspiracy to commit murder, she filed a pre-trial motion to dismiss the charge, contending, *inter alia*, that retrial was barred by principles of double jeopardy and collateral estoppel. The trial court denied the motion to dismiss.

The respondent appealed to the Connecticut Supreme Court, which affirmed in part and reversed in part the trial court's ruling on the motion to dismiss.

On appeal, the respondent claimed that the trial court improperly denied her motion to dismiss the conspiracy count which relied on the constiutional principle of collateral estoppel, as set forth in *Ashe v. Swenson*, 397 U.S. 436 (1970). She claimed that, because it was undisputed that she told Coleman that her mother was home alone on the evening of August 4, the verdict of acquittal on the accessory charge demonstrated that the jury neces-

sarily found that she did not have the intent to kill her mother. She argued that, because the element of intent to kill had been found in her favor, and because such intent is also an element of the conspiracy charge, collateral estoppel wholly precluded retrial of the conspiracy charge.

In its opinion the Connecticut Supreme Court initially considered whether collateral estoppel even applies to cases such as this one, where the jury had acquitted on one count of a multicount indictment and failed to reach a verdict on another count, and concluded that it does apply. *State v. Aparo*, 223 Conn. at 391-92.

The Connecticut Supreme Court then rejected the respondent's argument that by its verdict of acquittal on the accessory count the jury had necessarily decided the element of intent to kill in the respondent's favor. After a thorough review of the evidence, 223 Conn. at 393-401; the court determined that the jury, in acquitting the respondent of accessorial liability for the murder, could have had a reasonable doubt whether she encouraged or intentionally aided Coleman in committing the murder. *Id.* at 403-404. However, because encouraging or aiding in a murder is not

an element of conspiracy to commit that murder, collateral estoppel did not bar retrial of the conspiracy charge. *Id.* at 404.

The court then considered the respondent's claim that, even if retrial were not precluded, collateral estoppel required that much of the state's evidence from the first trial be excluded from the second trial. The respondent claimed that the verdict of acquittal necessarily indicated that the jury disbelieved all of the state's evidence regarding her activities and state of mind during the time period July 14 to August 5, 1987, the time period during which she had been charged with being an accessory, and which was included in the time period alleged by the state for the conspiracy.

The Connecticut Supreme Court recognized that in *Dowling v. United States*, 493 U.S. 342 (1990), this Court declined to extend *Ashe v. Swenson* to exclude from a defendant's criminal trial otherwise admissible evidence, solely because it related to criminal conduct for which the defendant had previously been acquitted. 223 Conn. at 406-7. The state supreme court also recognized that evidence

of predicate facts, as opposed to ultimate facts, need not be proven beyond a reasonable doubt and thus is not barred by collateral estoppel. *Id.* Nevertheless, the court concluded, "the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill." *Id.* at 409. The court held that on retrial the state could not use Coleman's testimony that the respondent requested, on the evening before the murder, that Coleman kill her mother, which the court concluded had necessarily been rejected by the jury. *Id.* at 410. The court concluded that this previously rejected evidence, if found on retrial to have been proven beyond a reasonable doubt, would establish an element of the conspiracy charge and and could form the basis of a conviction. *Id.* The supreme court remanded to the trial court for a determination of whether, in addition to the portion of Coleman's testimony it specifically ruled inadmissible, other evidence proffered by the state should be excluded from retrial. *Id.* at 410-11.

REASONS FOR GRANTING THE PETITION

I. The Connecticut Supreme Court Erred In Holding That The Principle Of Collateral Estoppel Applies To Cases Of Continuing Jeopardy, Where The Jury, On A Multicount Information, Acquits The Defendant On One Count And Fails To Reach A Verdict On The Other Count, And The State Intneds To Retry The Defendant On The Mistried Count

This Court has never whether collateral estoppel is applicable at all to situations where the state initially joined two offenses in one indictment or information and never contemplated more than one trial, but the jury deliberations resulted in an acquittal on one count and a deadlock/mistrial on the other.

Collateral estoppel, an aspect of double jeopardy protection, operates after an acquittal to prevent the state from re-litigating issues of ultimate fact decided by the acquittal in the defendant's favor. *Ashe v. Swenson*, 397 U.S. 436 (1970).

This Court's collateral estoppel cases have concerned successive prosecutions, as opposed to retrial after a mistrial. In the successive prosecution scenario there is no question that jeopardy has terminated at the end of the

first trial, and that the second trial will involve new and/or different charges. *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668 (1990); *Ashe v. Swenson*, *supra*; *see Sealfon v. United States*, 332 U.S. 575 (1948)(res judicata precluded second prosecution, where jury verdict in first trial was a determination favorable to defendant on facts essential to the second prosecution).

This Court has ruled that, where a jury deadlock has resulted in a mistrial, the double jeopardy principle is not implicated, because jeopardy on the mistried count has not yet terminated. *Sanford v. United States*, 429 U.S. 14 (1976). Retrial is also constitutionally permitted even when the trial resulted, in addition to the mistrial, in an acquittal on another count. *Richardson v. United States*, 468 U.S. 317, 325 (1984).

The continuing jeopardy principle should preclude the application of collateral estoppel in the acquittal-deadlock-retrial scenario. In this context, continuing jeopardy is analogous to the circumstances of *Price v. Georgia*, 398 U.S. 323 (1970), where acquittal on a greater offense does not preclude retrial of a lesser offense to

which continuing jeopardy has attached, where conviction of that offense reversed on appeal, even though defendant had been acquitted of greater offense.

Furthermore, where the second trial is the result of a neutral occurrence, such as the jury deadlock in the present case, and not prosecutorial abuse or manipulation, a criminal defendant should not be able to assert collateral estoppel on retrial any more than he or she would be able to assert a double jeopardy bar. *See Brown v. Ohio*, 420 U.S. 332 (1975) (where government could have, but did not, try greater and lesser offenses in single proceeding, double jeopardy precludes subsequent trial).

The Connecticut Supreme Court's application of constitutional collateral estoppel, where double jeoprady is not even implicated, conflicts with this Court's recent pronouncements on double jeopardy law. In *United States v. Felix*, ___ U.S. ___, 112 S.Ct. 1377, 1384-85 (1992), this Court held that double jeopardy does not preclude a prosecution of a conspiracy charge despite a prior prosecution of the underlying substantive crime, even where there is an overlap of proof. *See Grady v. Corbin*, 495 U.S. 508

(1990) (rejecting "same evidence" test to determine whether double joepardy implicated in successive prosecutions).

But if collateral estoppel applies in such situations, a criminal defendant could still avoid prosecution. Even if that consequence should be borne by the state where it has chosen a strategy of successive prosecutions, collateral estoppel should not apply where the state tried both counts simultaneously and where jeopardy continues from the first trial. Indeed, in *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984), this Court said in *dicta* "[W]here the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."

Furthermore, because the aquittal-deadlock situation is analogous to inconsistent verdicts, collateral estoppel should have no effect. The law tolerates inconsistent verdicts, despite the possibility that the jury usurped authority that it did not have, or that it may have acted with leniency despite believing the defendant guilty. *United States v. Powell*, 469 U.S. 57 (1984); *Dunn v. United States*, 284 U.S. 390 (1932). The principle of collateral

estoppel, which is predicated on the assumption that the jury acted rationally, has no application to the inconsistent verdict situation. *United States v. Powell*, 469 U.S. at 68; *Standefer v. United States*, 447 U.S. 10, 23 n.17 (1980). If the verdicts are consistent, then no issue of ultimate fact decided at the first trial will be at issue in the second trial, so collateral estoppel cannot apply.

The Connecticut Supreme Court's expansive use of collateral estoppel is questionable in light of decisions by this Court in the successive prosecution context in *Yates v. United States*, 354 U.S. 298 (1957), and in *Dowling*, which refused to extend *Ashe* to preclude the reuse of otherwise relevant and admissible evidence. There is no legal or logical reason for affording the principle of collateral estoppel broader use where the charges were intially tried together.

A few federal and state courts have questioned whether collateral estoppel, like its constitutional parent double jeopardy, is limited to successive prosecutions and thus has no applicability in the acquittal-deadlock-retrial context. *See, e.g., United States v. Farmer*, 923 F.2d 1557,

1563 (11th Cir. 1991)(questioning whether collateral estoppel even applies in continuing jeopardy cases); *Butler v. Maryland*, 605 A.2d 186, 202 n.13 (Md. 1992) ("serious doubt" whether collateral estoppel applies to retrial following acquittal-deadlock); *see also United States v. Seijo*, 537 F.2d 694, 699 (2d Cir. 1976)(declining to consider whether collateral estoppel applies to retrial). Other courts have recognized the holding of *Ashe* regarding constitutional collateral estoppel to be limited to its facts, i.e., the relitigation of a ultimate issue of fact in a subsequent prosecution. *See, e.g., United States v. Head*, 697 F.2d 1200, 1205 (4th Cir. 1982).

This Court should grant the petition so that it may consider whether constitutional concerns are even implicated in the acquittal-deadlock-retrial context, which lacks the inherent oppressiveness and unfairness that collateral estoppel traditionally protects against. If *Ashe* establishes a preference for joinder in the first instance of all related charges, that goal was met here. If the principle of collateral estoppel discourages overeager prosecutors from serial prosecutions seeking multiple convictions from the same

transaction, that consideration is not implicated in the acquittal-deadlock-retrial context. Moreover, considerations inherent in the criminal process weigh against expanding collateral estoppel to the continuing jeopardy situation. These considerations include the state's compelling interest in the enforcement of its criminal laws, and the public's interest in the accuracy and justice of the results in criminal trials.

II. If Collateral Estoppel Applies In Cases Of Continuing Jeopardy, It Precludes Only Relitigation Of Ultimate Issues And Does Not Operate To Bar The Reuse Of Evidentiary Facts

The second important question presented by this case is, if collateral estoppel applies at retrial following an acquittal-deadlock, whether it results in issue preclusion only, or whether is may be applied to preclude the prosecution from using evidence that had dual relevance at the first trial; i.e., where the same evidentiary facts were proffered at the first trial on both the acquitted count and the deadlocked count.

Collateral estoppel does not bar the relitigation of every factual issue. In *Yates v. United States*, 354 U.S. 298

(1957), this Court rejected the claim that, where nonconstitutional collateral estoppel does not bar retrial, it can nevertheless have partial conclusive effect, to bar evidentiary issues. The Court stated:

> We think, however, that the doctrine of collateral estoppel does not have any such concept of "conclusive effect" as that contended for by the petitioner. The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or "mediate" facts are concerned, the doctrine of collateral estoppel is inoperative.

354 U.S. at 337-38. There is no legal or logical basis for giving constitutional collateral estoppel greater effect.

"An ultimate fact is an issue which is the *sine qua non* of a conviction in the second trial." *People v. Goodman*, 503 N.E. 2d 996 (N.Y. 1986). In *Ashe*, which speaks only of "ultimate" facts, this Court held that collateral estoppel entirely barred a subsequent prosecution where the state sought to relitigate the same *legal* issue decided in the first trial. *United States v. Davis*, 809 F.2d 1194, 1206 (6th Cir. 1987). In *Dowling v. United States*, this Court refused to convert collateral estoppel protection into

a blanket prohibition on the reuse of evidence in a subsequent prosecution after acquittal in a prior trial. Where evidence found in the defendant's favor at the first trial is not an "ultimate" fact at the second trial, it is admissible as an evidentiary fact.

In addition, use of collateral estsoppel to preclude evidentiary facts conflicts with *Grady v. Corbin*, 495 U.S. 508 (1990); which held that the double jeopardy clause "bars any subsequent prosecution in which the government to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 521. The Court went on to say that "This is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Id.* *See United States v. Felix*, 112 S.Ct. at 1385 (*Grady* does not bar successive prosecutions involving the same conduct, even where there is an overlap of proof).

Even though *Grady* was a "pure" double jeopardy case, at least one court has recognized that *Grady*'s "con-

duct constituting an offense" test applies with equal force to determine whether collateral estoppel requires that certain evidence must be excluded on retrial. *United States v. Farmer*, 923 F.2d 1557, 1564 n.16 (11th Cir. 1991). When that test is applied here, it is evident that the state is not seeking to relitigate the respondent's accessorial liability. thus the reuse of evidence should not have been barred by the Connecticut Supreme Court.

In spite of these pronouncements, the Connecticut Supreme Court precluded the state's reuse of certain factual evidence, even where on retrial those facts, arguably found in the respondent's favor at the first trial, will not be the only evidence offered to establish any element of the conspiracy charge. In so doing, the state court erroneously expanded the collateral estoppel principle beyond issue preclusion and into an unwarranted restriction on the prosecution's proof.

The Connecticut Supreme Court also erred in finding a constitutional basis for its proof-limiting application of collateral estoppel. Where the application of collateral estoppel would merely restrict proof, but would

not preclude relitigation of an ultimate fact, so as to bar a second prosecution, it may implicate the common law defenses of res judicata or collateral estoppel, but it does not raise constitutional concerns. *See Sealfon v. Untited States*, *supra*; *see also Standefer v. United States*, 447 U.S. 10 (1980) (refusing to extend nonmutual collateral estoppel to criminal cases); *Harris v. Washington*, 404 U.S. 55 (1971)(collateral estoppel protects defendant against subsequent prosecution). Double jeopardy guarantees are not implicated by proof-limiting claims, and thus the collateral estoppel principle in such situations is not constitutional in nature. *See United States v. Abney*, 431 U.S. 651, 659 (1977)(contrasting double jeopardy and evidence suppression rulings); *United States v. DeVincent*, 632 F.2d 155, 160-61 (1st Cir. 1980)(recognizing distinction between proof-limiting and constitutional collateral estoppel), *cert. denied*, 450 U.S. 984 (1981).

Finally, the Connecticut Supreme Court's decision conflicts with courts holding that an acquittal on one set of facts does not preclude use of the same evidence at a subsequent trial. *United States v. Farmer*, 923 F.2d at 1564;

United States v. Dray, 901 F.2d 1132 (1st Cir. 1990); *United States v. Gentile*, 816 F.2d 1157 (7th Cir. 1987); *United States v. Davis*, 809 F.2d 1194, 1206 (6th Cir. 1987); *Flittie v. Solem*, 751 F.2d 967, 972 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); *United States v. Price*, 750 F.2d 363 (5th Cir. 1985); *United States v. Ballard*, 586 F.2d 1060 (5th Cir. 1978); *United States v. Kills Plenty*, 466 F.2d 240 (8th Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *People v. Goodman*, 69 N.Y.2d 32, 511 N.Y.S.2d 565, 503 N.E.2d 996 (1986). One court has formulated the test as whether the evidence has "independent significance" on the retried count, where the issue is "wholly distinct" from any issue decided by the jury at the initial trial. *United States v. Dray*, 901 F.2d at 1138-39. In the present case, all of the state's evidence had independent significance on each count.

CONCLUSION

The Connecticut Supreme Court has broadened the constitutional principle of collateral estoppel by applying it in the acquittal-deadlock-retrial context. It has also disregarded this Court's limitations on the use of constitu-

tional collateral estoppel by expanding its application to proof-limiting situations which are outside the scope of double jeopardy concerns.

The writ of certiorari should be granted to address these important issues.

Respectfully submitted

THE STATE OF CONNECTICUT,
Petitioner.

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December, 1992

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APPENDIX

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Opinion of the Connecticut Supreme Court..... 1A

STATE OF CONNECTICUT *v.* KARIN APARO (14443)

PETERS, C. J., GLASS, COVELLO, BERDON and SANTANIELLO, Js.

The defendant appealed to this court from the trial court's denial of her motion to dismiss all charges pending against her. The defendant, who had been charged with the crimes of murder as an accessory and conspiracy to commit murder in connection with the killing of her mother by her then boyfriend, C, had been acquitted of the accessory charge but the twelve member jury could not reach a verdict on the conspiracy charge. *Held:*

1. There was no merit to the defendant's claim that, because she obtained at least six votes for acquittal on the conspiracy charge, and because that charge could have been tried by a jury of six, the double jeopardy clause of the fifth amendment barred a second prosecution for that crime; had the defendant preferred a jury of six for both charges she could have so elected, and because the jury did not come to any conclusion on the conspiracy charge, the vote tally had no legal significance.
2. Although collateral estoppel bars the state from relitigating a question of fact that has been determined by a partial verdict in the defendant's favor, retrial on the conspiracy charge was not precluded, under the circumstances here; the jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided C was not inconsistent with the conclusion that the defendant had entered into a conspiracy with C to commit murder.
3. The trial court, in denying the defendant's motion to dismiss, should not have determined that no evidence should be excluded on retrial; accordingly, on retrial, that court must exclude evidence offered in the first trial if it can be demonstrated that the jury, in acquitting the defendant on the accessory charge, harbored a reasonable doubt as to the truth of the fact sought to be proven and that the alleged fact, if proven, would establish an element of the offense of conspiracy and could, therefore, form the basis of a conviction on that count.

Argued June 2—decision released August 11, 1992

Motion to dismiss the second count of an information charging the defendant with the crime of con-

spiracy to commit murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Damiani, J.*; judgment denying the motion to dismiss, from which the defendant appealed. *Affirmed in part; reversed in part.*

Hope C. Seeley, with whom, on the brief, was *Hubert J. Santos,* for the appellant (defendant).

Judith Rossi, assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *James E. Thomas,* senior assistant state's attorney, for the appellee (state).

PETERS, C. J. The principal issue in this appeal is whether the principles of double jeopardy and collateral estoppel prohibit the state from retrying, on a charge of conspiracy to commit murder, a defendant who has been acquitted of a charge of accessory to murder. The defendant, Karin Aparo, was charged with one count of murder as an accessory in violation of General Statutes §§ 53a-54a (a)[1] and 53a-8,[2] and one count of con-

[1] General Statutes § 53a-54a provides: "MURDER. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

"(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

"(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony."

[2] General Statutes § 53a-8 provides: "CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission

spiracy to commit murder in violation of General Statutes §§ 53a-48 (a)[3] and 53a-54a (a). A jury acquitted her of the accessory charge but could not reach a verdict on the conspiracy charge. After the trial court declared a mistrial on the conspiracy count, the state announced its intention to retry the defendant on that count. The defendant filed a motion to dismiss all pending charges. Upon the trial court's denial of this motion, the defendant took an interlocutory appeal to the Appellate Court, which we transferred to ourselves pursuant to Practice Book § 4023 and General Statutes § 51-199 (c).[4] We affirm in part and reverse in part.

The defendant has raised three issues on appeal. She maintains that the trial court should have granted her motion to dismiss and barred her retrial for conspiracy because: (1) principles of double jeopardy preclude retrial when six out of twelve jurors vote for acquittal; (2) principles of collateral estoppel preclude retrial, because the jury necessarily found that she had never intended that her mother be killed; and (3) principles of collateral estoppel require the exclusion of certain

of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

[3] General Statutes § 53a-48 provides: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

"(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

[4] "Colorable claims of double jeopardy are an exception to the general rule that appeals in criminal cases must ordinarily await the final judgment that arises from imposition of sentence." *State* v. *Boyd*, 221 Conn. 685, 688 n.4, A.2d (1992); *Abney* v. *United States*, 431 U.S. 651, 659-62, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977).

evidence, leaving insufficient admissible evidence to warrant a retrial. We reject the first and second of these claims, and accept the third in part.

I

The defendant first claims that, because she obtained six votes for acquittal on the conspiracy count, and because that count could have been tried by a jury of six, the double jeopardy clause of the fifth amendment, which "serves to safeguard defendants in criminal proceedings against multiple punishments or repeated prosecutions for the same offense"; *State* v. *Aillon*, 182 Conn. 124, 127, 438 A.2d 30 (1980), cert. denied, 449 U.S. 1090, 101 S. Ct. 883, 66 L. Ed. 2d 817 (1981); protects her against a second prosecution.

On February 17, 1988, the defendant moved to sever the murder and conspiracy counts on the ground, inter alia, that she was entitled under General Statutes §§ 54-82b (c) and 54-82 (c) to a jury of twelve for the crime of murder and a jury of six for the crime of conspiracy. On April 26, 1990, she supplemented her motion by arguing in the alternative that, if the court denied the motion to sever the counts, two juries should be empaneled, one of twelve jurors for the murder count and one of six jurors for the conspiracy count. The motion was denied and an exception was taken.

The vote on the mistried conspiracy count was seven to five for acquittal. The defendant contends that, having secured at least six votes in her favor, she is protected by principles of double jeopardy from retrial. She claims that this is so, first, because she alleges that the trial court should have granted her request for a jury of six on the conspiracy count, and second, because the factual elements of the conspiracy count were resolved in her favor by six jurors, the same number she would have to persuade on retrial.

Section 54-82b (c) provides: "In any criminal trial by a jury, except as otherwise provided by law, such trial shall be by a jury of six." Section 54-82 (c) provides that "no person, charged with an offense which is punishable by death or life imprisonment, shall be tried by a jury of less than twelve without his consent." We do not read these provisions to require that separate juries be provided when only some of the charges against a defendant are punishable by death or life imprisonment. Had the legislature intended such an extraordinary measure, it would have explicitly provided for it. In this case, had the defendant preferred a jury of six, she could have so elected.

We decline the defendant's invitation to speculate that, had she consented to a trial before a jury of six, it would have consisted of six of the seven jurors who voted for acquittal. Because the jury did not come to any conclusion, the vote tally is legally irrelevant. "It is settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous. . . . A nonunanimous jury therefore cannot render any 'finding' of fact." *State* v. *Daniels*, 207 Conn. 374, 388, 542 A.2d 306 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989). This claim is therefore without merit.

II

Next, the defendant claims that collateral estoppel prevents the state from retrying her on the charge of conspiracy, because such a retrial would permit the state to relitigate issues necessarily decided in her favor in the first trial. Collateral estoppel is given constitutional dimensions by the double jeopardy clause. It is well established that retrial following a jury deadlock does not violate the constitutional provision against double jeopardy. *Aillon* v. *Manson*, 201 Conn. 675, 678, 519 A.2d 35 (1986); *State* v. *Aillon*, supra, 129–30.

We recently discussed in some detail the relationship between double jeopardy and collateral estoppel. In *State* v. *Hope*, 215 Conn. 570, 577 A.2d 1000 (1990), cert. denied, U.S. , 111 S. Ct. 968, 112 L. Ed. 2d 1054 (1991), we stated: "In a criminal case, collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. *Ashe* v. *Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). ' "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' Id., 443. 'Collateral estoppel applies in two ways: (1) it may bar prosecution or argumentation of facts necessarily established in a prior proceeding; or (2) it may completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks. *United States* v. *Griggs*, 735 F.2d 1318 (11th Cir. 1984).' *United States* v. *DeMarco*, 791 F.2d 833, 836 (11th Cir. 1986).

"To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the government is attempting to relitigate those facts in the second proceeding. *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Irvin*, 787 F.2d 1506, 1515 (11th Cir. 1986). 'A defendant who argues that *Ashe* is applicable to his case carries the burden of establishing that the issue he seeks to foreclose from consideration in the second case was "necessarily" resolved in his favor in the prior proceeding. *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S. Ct. 745, 50 L. Ed. 2d 756 (1977).' *United States* v. *Castro*,

629 F.2d 456, 465 (7th Cir. 1980). Furthermore, when a defendant is acquitted of conspiracy and then retried on the substantive offense, 'if it can be determined that the first jury must have determined an ultimate fact common to the conspiracy and substantive crimes in the defendant's favor, acquittal of conspiracy may prevent the government from introducing the evidence necessary to convict the defendant of the substantive offense in a subsequent trial.' *United States* v. *Bollinger*, 796 F.2d 1394, 1406 (11th Cir. 1986).

" 'The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States*, 332 U.S. 575, 579 [68 S. Ct. 237, 98 L. Ed. 180 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.' *Ashe* v. *Swenson*, supra, 444." *State* v. *Hope*, supra, 584–85.

In *Hope*, the state sought to prosecute the defendant for aiding and abetting murder after the defendant had been acquitted of conspiracy to commit capital felony murder and the lesser included offense of conspiracy to commit murder. We held that the trial court should have granted the defendant's motion to dismiss,

because in the earlier prosecution the jury had necessarily determined that the defendant lacked the specific intent that the victim be murdered. Because that same intent would have been an element essential to the prosecution for aiding and abetting murder, the state was collaterally estopped from proceeding with that prosecution. Id., 588–89.

The defendant here claims that, as in *Hope*, issues that the state would have to prove at retrial were necessarily resolved in her favor by the jury in the first trial. To evaluate this claim we must decide, first, whether *Ashe* v. *Swenson*, supra, applies when a jury acquits on one count in a multicount indictment and does not reach a verdict on another count. *Ashe* v. *Swenson*, supra, 443, held that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the parties in any *future* lawsuit." (Emphasis added.) *Ashe* involved two successive proceedings against the defendant, whereas here jeopardy continues to attach from the first trial; see 3 W. LaFave & J. Israel, Criminal Procedure (1984) p. 75; and the jury could permissibly have returned inconsistent verdicts in the first trial. See *United States* v. *Powell*, 469 U.S. 57, 68–69, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). It may, therefore, be argued that extending collateral estoppel to the context of a retrial on one or more counts of a multicount indictment cannot be reconciled with the rule that inconsistent verdicts are permissible. Moreover, because jeopardy continues, it is arguable that the second trial is not a "future lawsuit" for *Ashe* purposes. The United States Supreme Court has not addressed this issue, and it is is a question of first impression for this court.

Courts that have considered the issue have held "with virtual unanimity" that collateral estoppel bars the state from relitigating a question of fact that was deter-

mined in the defendant's favor by a partial verdict. *United States* v. *Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979); see *United States* v. *Frazier*, 880 F.2d 878, 882–83 (6th Cir. 1989), cert. denied sub nom. *DeBusk* v. *United States*, 493 U.S. 1083, 110 S. Ct. 1142, 107 L. Ed. 2d 1046 (1990); *United States* v. *Mespoulede*, supra, 336–37 (citing cases). We are persuaded by the reasoning of those cases.

"We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence. There is no question but that a jury in a criminal trial has the power to render a verdict of acquittal that is wholly at odds with the law and the facts. . . . We recognize that the jury is in a sense the conscience of the community and can, for example, render a verdict to mitigate an overly severe punishment. . . . Similarly, in compromising in order to reach a unanimous verdict, a jury is often fulfilling its role as a cross-section of the community that it is supposed to represent. Occasional anomalies are the price of unanimity. . . .

"Internal inconsistency, then, is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed . . . implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." (Citations omitted; internal quotation marks omitted.) *United States* v. *Mespoulede*, supra, 336–37.

We, therefore, reach the merits of the defendant's claim. In order to do so, we must examine the evidence that was presented to the jury that led it to acquit the defendant of the charge of aiding Dennis Coleman in the murder of her mother but to disagree on the charge of her conspiring with Coleman for the same purpose.

A

The defendant and Coleman gave contradictory testimony concerning the events leading up to the murder of the defendant's mother, Joyce Aparo. Coleman testified that the defendant, for more than a year preceding the murder, had repeatedly begged him to kill her mother, and that they had planned the murder together in detail the night before he did it. The defendant testified that she had never made any such request, and that she had not known that the murder would take place.

Coleman's testimony was as follows. In 1986 and 1987, the defendant lived with her mother in Glastonbury. In June, 1986, Coleman, then eighteen years old, met and began dating the defendant, who was fifteen years old. During the summer of 1986, the defendant and Coleman began a sexual relationship. At that time, they discussed the defendant's unhappiness with her life at home with her mother, with whom she had a painfully difficult relationship. At first they discussed a plan whereby the defendant would leave her mother and Coleman would become her guardian, but this plan was abandoned when they discovered that the defendant would have to be sixteen years old in order to select her own guardian. The defendant then initiated a discussion with Coleman about killing her mother.

These discussions continued throughout the summer of 1986. At one point, Coleman and the defendant discussed a plan whereby the defendant would stab her mother and then claim self-defense. This plan was aban-

doned when the defendant decided that she could not go through with stabbing her mother herself. They then decided that the defendant would flick the lights of her house as a signal for Coleman, who lived nearby, to come over and kill the victim. The lights did flash, but Coleman did not enter the house.

Coleman's testimony with respect to this incident was supported by a letter written to him by the defendant at that time stating that "[p]romises are very nice but I was taught never to promise anything unless I had an intention of carrying it out," that "I told you that you wouldn't be able to," that "I didn't ask you this time. You offered," and "Don't promise freedom when you don't have the keys to the cage. It's not fair!" Coleman testified that he had discussed this letter with the defendant and had assured her that he would keep his promise to her.

On a subsequent occasion, while Coleman was visiting the Aparo home, the defendant told him that she was going to put some sleeping pills into a sandwich that she was making for her mother. Coleman did nothing to stop her. Joyce Aparo took one bite of the sandwich, but decided that the relish was bad and sent them out to buy new relish.[5]

The evidence included other letters that Coleman and the defendant had written to each other during that summer. In one letter, Coleman stated "[a]ny sacrifice I will make," "[s]oon—for you—I will give my soul to something black," and "[y]ou know I would kill for you." The defendant wrote to Coleman: "I will do whatever is necessary. It is a decided thing and I will do it even if you won't help me. It is just another thing to do on my 'priority list' & right now it has a very high

[5] The jury was instructed that they could only use the evidence of the sandwich incident as evidence of intent, but that they could not substitute it for the acts with which the defendant was charged.

billing." In the same letter, she also wrote, "[l]eave the logistics to me unless you want to help," and "[m]y God, do you realize what we're thinking?" In the last of the letters from the summer of 1986 that were introduced into evidence, the defendant stated that she knew they could not follow through on their plan. "Being realistic we both know we could never hurt my mom. I know I couldn't have stood by while someone else did." Thereafter, the conversations about killing Joyce Aparo tapered off. The defendant and Coleman continued to see each other on an almost daily basis until the spring of 1987.

In early May, 1987, the defendant began spending the weekends at the Rowayton home of her violin teacher, Albert Markov. When Coleman became upset about the effect of her absences on their relationship, the defendant explained that she was trying to get away from her mother. She also told Coleman that she was in love with Alex Markov, her teacher's son. Later in May, she suggested to Coleman that they should stop communicating for a month, and he agreed. When they next spoke in late June, she told Coleman that she had had sexual relations with Alex Markov, but that her relationship with Markov had become platonic. From July 7 to 14, she traveled with Alex Markov to Woodstock, New York. While there, she spoke with Coleman several times by telephone. He then believed that the defendant's relationship with Alex Markov was platonic, but he was suspicious. Coleman testified that his relationship with the defendant during this time was "stressful."

After the defendant's return from Woodstock, discussions about killing Joyce Aparo resumed. The defendant told Coleman that her mother was forcing her to stay in Rowayton and to continue her relationship with Markov. Toward the end of July, she told Coleman that she, her mother, Albert Markov and Alex

Markov would shortly be traveling to Binghamton, New York for three or four days. Two times during the week before the trip, the defendant spoke to Coleman through her bedroom window. During the first of these conversations, the defendant cried and demanded that her mother be killed soon because she could not stand it any more. During the second conversation, the defendant said that it had to be done before the trip, because she could not bear the thought of having to go on vacation with her mother and the Markovs. They then discussed killing Joyce Aparo by holding a rag saturated with bleach and ammonia over her face or by strangling her. They agreed that Coleman would come into the house that night, kill the victim, and carry away the body, and that the defendant would clean up and wipe away fingerprints afterward. Coleman lost his nerve, however, and did not go through with his part of the plan. The next day, shortly before leaving for Binghamton, the defendant telephoned Coleman. At first she was upset that he had not carried out the plan, but then became "more understanding," and told him that she would be home on August 4. She asked him to go to the Aparo home, to let himself in with a key she had previously given to him, and to feed her cats, which he agreed to do. They agreed to carry out the murder plan on August 5. During one of the visits to feed the cats, Coleman put a note between the sheets of the defendant's bed stating, "I will do the deed."

On August 4, the defendant, who had returned from Binghamton and was staying in Rowayton, spoke four times by telephone with Coleman. She first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it happened. In the third conversation, the defendant insisted

that the body be left where it could be found, so that the victim's life insurance would be paid to the defendant. During the last conversation, Coleman informed the defendant that a friend had agreed to help him.

At 1 a.m. on August 5, Coleman, accompanied by two friends, entered the Aparo home and strangled Joyce Aparo in her bed with a pair of pantyhose. Coleman and his two friends then took the body away in the victim's car, and abandoned the body and the car in Bernardston, Massachusetts.

Coleman's testimony was supported by that of two friends of the defendant. Shannon DuBois testified that on August 6, the defendant had told her that Coleman had committed the murder. The defendant had told DuBois that she and Coleman had discussed killing her mother on five different occasions, and that they had discussed a number of ways of committing the murder, including the use of chloroform, stabbing her mother, and cutting the brake lines of her mother's car. The defendant had also described the sandwich incident. The defendant had said that she had spoken with Coleman the night before the murder, and had not wanted to be there when it happened, but had planned to come back the next day, clean up the house, and call the police. Another friend, Jill Smith, testified that several months after the murder, the defendant had told Smith that Coleman had called her on the night of the murder, that he had been upset that she was not in Glastonbury, and that he had told her that he would kill her mother. The defendant had also told Smith that she had not thought that Coleman was serious, because on prior occasions he had said he would kill Joyce Aparo and had not followed through.

The state offered other evidence of actions by the defendant after Joyce Aparo's death that, it claimed, demonstrated her consciousness of guilt. Beverly

Warga, an administrative secretary at the police department, testified that on August 5, 1987, she had overheard a telephone conversation in which the defendant had asked, "Where did you do it? Did you hurt your head? Don't worry about it, I'll be there soon. I'll take care of you." Ann Marie Murray, who had been a coworker of Joyce Aparo's, testified that on August 6, 1987, the defendant had stated that she would be getting $300,000 from an insurance policy. There was evidence that the defendant had concealed evidence and had lied to the police about her knowledge that Coleman had committed the murder, and that she had had sexual relations with Coleman twice after he was arrested. On August 20, 1987, she wrote a letter to Coleman stating, "I really believe that we'll turn out O.K. Even if we both have to spend 25 years in jail."

The defendant, who testified on her own behalf, denied that she had requested or aided Coleman to kill her mother. She testified that her diary entries, which had been admitted into evidence and which stated that "Den & I have our plot" and "Update: Will not carry out plan," referred to her plan with Coleman to run away and get married. She testified that her "priority list" letter had also referred to her plan to run away.

She admitted that there had been a single actual discussion of killing her mother, and that this had led to the flicking of the lights incident. The discussion occurred after her mother had threatened to break up her relationship with Coleman, and she told Coleman that she wished her mother would die. He responded by suggesting that the defendant kill her mother and claim self-defense. When the defendant rejected this suggestion, he offered to do it himself by hiding in the house while they were away. The defendant then said that it would be better for him to be outside the house, and for her to signal him by flashing the lights. The idea was then dismissed as irrational. Later that day,

however, the defendant and her mother did go out, and when they returned, her mother accidentally flicked the lights off and on. This frightened the defendant, who locked the door and drew the curtains. The defendant acknowledged that two of her letters to Coleman had referred to this incident. She testified, however, that she had not intended to kill her mother.

The defendant admitted that, after one bitter argument after her mother had found a note discussing the defendant's plan to run away with Coleman, she had crushed two of her mother's Fiorinal tablets and put them in her mother's sandwich. Her intention, however, had been not to kill her mother, but only to calm her down.

After the defendant began spending time with Alex Markov in May, 1987, her relationship with her mother improved. During this same time, her relationship with Coleman began to dissolve, and after she began sleeping with Markov, she suggested to Coleman that they separate for a month so that she could work out her feelings. Several witnesses and her diary entries corroborated her testimony that her relationship with her mother had been improving during this time.

The defendant testified that she had lied to Coleman when she had said that she did not want to go to Binghamton and that her mother was forcing her to do so. She testified, and her diary indicated, that she had been looking forward to the trip and to going to parties with Markov. She had done this because she had not wanted Coleman to think that she "was voluntarily spending time with Alex" and because she "knew he was jealous."

In the August 4 telephone conversations, the defendant testified, she had not discussed killing her mother at all, but rather had telephoned Coleman to tell him that it would no longer be necessary for him to feed

the cats, because her mother had returned home. Coleman had been angry at her mother for making her stay in Rowayton and had said, "sometimes I just wish I could kill her."

In order to explain certain of her statements and actions, the defendant also presented evidence that she had been physically and emotionally abused by her mother. Numerous witnesses testified about the abuse, and reports were introduced that had been prepared by the Department of Children and Youth Services, which several times had investigated allegations of abuse, and by Norwalk Hospital, which had treated the defendant after a suicide attempt when she was twelve years old. Two psychiatrists, John Cegalis and Walter Borden, testified as expert witnesses on the defendant's behalf. Both opined that she fit the profile of an abused and battered child and suffered from post traumatic stress disorder. Cegalis testified that the defendant's expressions of desire for her mother's death did not indicate an intent to kill, but rather a fantasy that was normal in an abused child. Cegalis also said that the defendant's continuation of her relationship with Coleman, knowing that he had murdered her mother, was not abnormal for a battered child, because such children have a "morbid fear" of being rejected or abandoned. In light of her ambivalent feelings about her mother, Cegalis stated that "it would be understandable" for her to wish to hold onto, and even to try to protect, the one important person left in her life.

The defendant also presented evidence that Coleman had acted on his own in order to terminate the defendant's relationship with Markov, which Joyce Aparo had been encouraging. On cross-examination, Coleman admitted that he had been jealous of the defendant's relationships with other men, and that he had been depressed and upset as a consequence of her relationship with Markov. He testified that in late July, 1987,

when the defendant asked him what he would do if he knew that she and Markov had had sexual intercourse twenty times, "I told her that if that was true, I would drive off the road and kill us both." He said that on August 3, 1987, while he was in the Aparo home feeding the cats, he had become upset when he saw a pile of photographs of the defendant with Markov. He acknowledged that he had previously stated that he felt that it had been a situation of self-defense, in that it came down to Joyce Aparo or himself.

B

The defendant claims that the trial court improperly denied her motion to dismiss the conspiracy count on grounds of collateral estoppel. We do not agree.

In the present case, in order to acquit the defendant of being an accessory to murder, the jury would have had to find either that (1) she did not intend that her mother be killed, or (2) she did not solicit, request, command, importune, or intentionally aid Coleman to commit the murder, or (3) both.[6] On the other hand, in order

[6] The defendant, noting that the trial court, over her objection, instructed the jury that it had to find that "she intended to aid, assist *or join* Dennis Coleman in the commission of the murder of her mother," (emphasis added) claims that this instruction collapsed the distinction between the accessory and conspiracy statutes, so that acquittal of one necessarily implied acquittal of the other. The defendant argues that, because the ordinary meaning of "join" is "agree," and because agreement is the only element of conspiracy that will be an issue in the new trial (Joyce Aparo's death making the existence of an overt act indisputable), the jury necessarily found that the defendant did not conspire with Coleman.

Taken in context, however, the court's instruction does not support the defendant's argument. The court stated: "There are three elements the State must prove beyond a reasonable doubt in order to warrant a conviction: First, the defendant intended to cause the death of her mother; second, with the intent to cause her mother's death, she solicited, requested, commanded, importuned or intentionally aided Dennis Coleman to cause her mother's death; and, third, acting with these intentions, she intended to aid, assist or join Dennis Coleman in the commission of the murder of her mother." The defendant correctly noted that the third of these elements

for the jury on retrial to convict the defendant of conspiracy, "it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Further, the prosecution must show both that the conspirators intended to agree and that they intended to commit the elements of the underlying offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Lewis*, 220 Conn. 602, 606–607, 600 A.2d 1330 (1991).

The defendant claims that, because it is undisputed that she aided Coleman by telling him that the victim was home alone, the verdict of acquittal demonstrates that the jury necessarily found that she did not have the intent to kill her mother. Since the state would have to prove such an intent in order to convict her of conspiracy, she contends, collateral estoppel bars a retrial on that charge. We do not agree.

"We have previously stated that a conviction under § 53a-8 requires proof of a dual intent, i.e., that the accessory have the intent to aid the principal and that in so aiding he intend to commit the offense with which he is charged." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Foster*, 202 Conn. 520, 525–26, 522 A.2d 277 (1987). Accessorial liability "is designed

was not in the statute. As given, however, this instruction clearly separates the question of the defendant's intent to join Coleman from that of whether she solicited, requested, commanded, importuned, or intentionally aided Coleman to commit the murder. The jury was not told that its resolution of the former question would answer the latter as well. On the contrary, the court stated that "if you find that the State has failed to prove any one of these elements to you beyond a reasonable doubt, you must find the defendant not guilty." The instruction, although incorrect, did not weaken the state's burden of proving accessorial acts and did not permit the jury to substitute a conspiracy for such acts.

to punish one who intentionally aids another in the commission of a crime and not one whose innocent acts in fact aid one who commits an offense." Id., 531.

Although the defendant concededly told Coleman that her mother was home on the night of the murder, the jury could reasonably have found, on the basis of either Coleman's or the defendant's testimony, that although she may have wanted to kill her mother, she did not make *this* statement with the intention that it result in her mother's death. According to the defendant, the reason she told Coleman that her mother was home was to indicate that it would no longer be necessary for him to go to the house to feed the cats. Coleman testified that the defendant had told him, during their first conversation on August 4, either that her mother was home alone or that her mother was coming home. At the time of that conversation, according to Coleman, the defendant's plan was for her mother to be killed the following night. By that time, the information that Joyce Aparo was home alone on August 4 would obviously have become too stale to be useful in the commission of the crime. Only in a later conversation did the defendant change the plan and ask him to kill her mother that night. Thus, even if the jury believed Coleman's account, it might have concluded that at the time the defendant told him her mother was or would be home alone, she did not know that this information would aid him in the commission of the murder. The aid would then have been analogous to the defendant's act in giving Coleman the key that he used to enter the house the night of the murder. Coleman testified on cross-examination that she had done this a number of months before, and had not done so for the purpose of helping him to kill her mother.

Given the numerous conflicts between the defendant's and Coleman's testimony, the jury could have chosen to disbelieve all or part of the latter. The jury might

reasonably have concluded that Coleman was untrustworthy because he was jealous of the defendant's relationships with other men and was angry at the defendant for his present predicament, and because he desired to shorten his prison sentence by currying favor with the authorities. The jury therefore might, for example, have decided to believe only those portions of his testimony that were corroborated by DuBois and Smith, both of whom testified that the defendant had admitted discussing the murder with Coleman shortly before he killed Joyce Aparo, but neither of whom testified that the defendant had requested Coleman to do so. Mere knowledge that a crime is going to be committed is not sufficient to establish liability as an accessory if the defendant does not encourage or intentionally aid in the commission of the crime. See *State* v. *Wakefield*, 88 Conn. 164, 172–73, 90 A. 230 (1914). The jury's conclusion that there was a reasonable doubt as to whether the defendant had solicited, requested, commanded, importuned, or intentionally aided Coleman would, therefore, not be inconsistent with the conclusion that the defendant had entered into a conspiracy to commit murder.[7] We conclude, therefore, that the principle of collateral estoppel does not bar the state from retrying the defendant for conspiracy to commit murder.

C

Finally, the defendant claims that much of the evidence that the state relied upon in the first case must be excluded from a retrial on the basis of collateral estoppel, and that the evidence that remains is insufficient to justify placing her on trial a second time, at least in the adult division of Superior Court. Specifi-

[7] The question of whether the evidence was sufficient to support a conviction for conspiracy has not been briefed or argued, and nothing in this opinion should be understood to prejudge this issue, which is likely to arise again on retrial.

cally, the defendant claims that the acquittal on the charge of being an accessory to murder shows that the jury necessarily disbelieved all the state's evidence regarding her activities and her state of mind from July 14 to August 5, 1987, the period during which the information charged that she had been an accessory. Therefore, she contends, the state may introduce into evidence only the conversations she had with Coleman during the summer of 1986, when she was fifteen years old.[8] She further asserts that General Statutes § 46b-121 assigns to the Juvenile Matters of the Family Division of the Superior Court exclusive original jurisdiction over children under sixteen years of age who commit delinquent acts, and that the information therefore must be dismissed for lack of jurisdiction or, in the alternative, that the case should be transferred to the Juvenile Matters docket.

This argument fails at its first juncture. As we have already noted, the defendant's acquittal on the charge of being an accessory to murder does not necessarily indicate that the jury disbelieved all of the state's evidence of her conduct after she turned sixteen years old. On the contrary, the jury could have reached the result it did if it believed every piece of that evidence except those parts of Coleman's testimony that directly indicated that the defendant had solicited, requested, commanded, importuned, or intentionally aided him in the murder of Joyce Aparo.

The trial court, however, rejected all of the defendant's collateral estoppel claims and refused to limit in any way the evidence that the state could introduce at the second trial. "[T]he state is not barred from putting Dennis Coleman or any other witness who testified in the first trial on the witness stand in the second trial. An acquittal on the First Count does not neces-

[8] The defendant turned sixteen on February 12, 1987.

sarily mean that the jury rejected any witness' testimony in toto." We agree with the last sentence just quoted, but disagree with the conclusion that Coleman's testimony will, therefore, be admissible in its entirety.

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, supra, 443. "In a criminal context, the doctrine prohibits the government from forcing a defendant to defend against charges or allegations which he overcame in an earlier trial." *United States* v. *Gornto*, 792 F.2d 1028, 1031 (11th Cir. 1986). "For estoppel to apply, the fact sought to be foreclosed by [the] defendant must necessarily have been determined in his favor in the prior trial; it is not enough that the fact *may* have been determined in the former trial." (Emphasis in original.) *United States* v. *Irvin*, supra, 1515. The defendant has the burden of showing "that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990); see id., 350–51.

The state maintains that *Dowling* v. *United States*, supra, establishes that a prior acquittal does not automatically preclude the state from using evidence presented in the first trial. *Dowling* held that, under the facts there presented, collateral estoppel did not bar the introduction of evidence of a crime that the defendant had previously been acquitted of committing. Dowling was first tried and acquitted for robbery A. Thereafter, he was prosecuted for robbery B, which (unlike the two robberies for which the defendant was successively tried in *Ashe* v. *Swenson*, supra) occurred at a different time and place. In that trial, evidence of his conduct in committing robbery A was offered to prove his identity as the perpetrator of robbery B: in

both robberies, the perpetrator had worn a ski mask, had carried a small pistol, and had been accompanied by a man named Delroy Christian. The court held that this did not constitute double jeopardy, noting that, "unlike the situation in *Ashe* v. *Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Dowling* v. *United States*, supra, 348. The court noted that, under the relevant rule of evidence, a similar act by the defendant is relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Id. Because the second trial did not require the state to prove Dowling's participation in robbery A beyond a reasonable doubt, the doctrine of collateral estoppel was inapplicable. Id., 348–50. Moreover, an examination of the record revealed that the acquittal did not necessarily represent a jury determination that the defendant had not been one of the masked men who had participated in robbery A. Id., 350–52.

Whether it is *Ashe* or *Dowling* that controls the admissibility of evidence in a case such as this depends on whether, as a general matter, the prosecution on retrial "may constitutionally rely on the same evidence or even the same theory relied upon in a former proceeding as long as the prosecution also presents an alternative—some other evidence or theory—on which the jury may base its verdict." A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U. Cin. L. Rev. 1, 12 (1989) (hereinafter "Collateral Estoppel"). The answer to that question depends on how the line is drawn between proof of ultimate facts and proof of predicate or evidentiary facts. Evidence of predicate facts, rather than ultimate facts, need not be proven beyond a reasonable doubt; *State* v. *Williams*, 220 Conn. 385, 398, 599 A.2d 1053 (1991); and is, therefore, not barred by collateral estoppel.

Where evidence of a crime of which the defendant has previously been acquitted is sufficient, but not necessary, to prove an ultimate fact in a later trial, it is in theory possible for the jury to use that evidence only to cast light on other facts not previously litigated, and to use those other facts as the primary basis of conviction. In that case, the crime previously tried would only be a predicate fact.[9] It is, however, equally possible that the second jury will convict the defendant solely on the basis of conduct that the first jury had found not to be proven beyond a reasonable doubt.[10] In such cases, "the close relationship between the charged offense and the acquitted offense creates a risk that

[9] If all proof of ultimate facts could thus be transformed by hypothesis into proof of evidentiary facts, then the doctrine of collateral estoppel would be inapplicable in any case in which a retrial was permissible, and thus would never act to bar evidence. See A. Poulin, "Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal," 58 U. Cin. L. Rev. 1, 8–9 (1989). *Dowling* v. *United States*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), does not suggest, however, that the court intended to discard the well established rule that collateral estoppel may exclude evidence in certain cases; see id., passim; annot., "Admissibility of Evidence as to Other Offense as Affected by Defendant's Acquittal of that Offense," 25 A.L.R.4th 934 (1983 & Sup. 1991); and courts have continued to apply that rule after *Dowling*. See, e.g., *United States* v. *Seley*, 957 F.2d 717, 722 (9th Cir. 1992); *United States* v. *Blackwell*, 900 F.2d 742, 745–46 (4th Cir. 1990); *Maryland* v. *Baxter*, 92 Md. App. 213, 607 A.2d 120 (1992); *Eatherton* v. *Wyoming*, 810 P.2d 93 (Wyo. 1991).

[10] No jury charge can be crafted that would permit the jury to use the challenged evidence for the permissible purpose while preventing the jury from using it for the impermissible purpose. Even the best intentioned jury probably could not follow such an instruction. Ordinary experience teaches us that once a person has arrived at a belief, that person will often be hard put to say which evidence was determinative in forming that belief and which evidence was merely helpful. Once the evidence is admitted, therefore, a risk exists, which court and jury alike are powerless to prevent, that the defendant's constitutional rights will be violated. We note that limiting instructions have been held to be inadequate where the jury has heard and been told to disregard compelling evidence of the defendant's guilt that was constitutionally inadmissible. See, e.g., *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (codefendant's confession admitted only against codefendant); *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (allegedly involuntary confession).

the jury will convict the defendant because the jury concludes beyond a reasonable doubt that the defendant committed the criminal conduct of which the prior jury acquitted the defendant. Collateral estoppel should protect the defendant against that risk . . . ." A. Poulin, "Collateral Estoppel," supra, 23. We conclude that evidence of crimes of which the defendant has previously been acquitted, and concerning which the prior jury demonstrably harbored a reasonable doubt, should be excluded when it "would establish an element of the charged offense and could therefore form the basis of the conviction . . . ." A. Poulin, "Collateral Estoppel," supra, 33; see *Maryland* v. *Baxter*, 92 Md. App. 213, 607 A.2d 120, 123 (1992); *Eatherton* v. *Wyoming*, 810 P.2d 93, 103-104 (Wyo. 1991).

In the case now before us, at least some of the evidence that, if believed, would have established the defendant's guilt of being an accessory to murder, would also have established that, intending that the crime of murder be performed, she entered into a conspiracy with Coleman. "In *Dowling*, the prior crime evidence was relevant to an essential element but would not itself, if proved, establish that essential element." A. Poulin, "Double Jeopardy: *Grady* and *Dowling* Stir the Muddy Waters," 43 Rutgers L. Rev. 889, 906 (1991). In this case, however, like *Ashe* and unlike *Dowling*, the prior acquittal indicates that the jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy, specifically agreement, intent to agree, and intent to kill. For example, Coleman testified that during the August 4 telephone conversations, the defendant first told him to kill her mother the following day after the victim had gone to bed, and then, in a later conversation, changed the plan, asking him to kill her mother that night while the defendant was still in Rowayton, because she did not want to be at home when it hap-

pened. Assuming, as we are required to do, that the jury complied with the court's instructions, its acquittal on the accessory charge requires the conclusion that it found that these alleged facts had not been proven beyond a reasonable doubt.[11] "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that [the defendant had made those statements], the State could not present the same or different . . . evidence in a second prosecution . . . in the hope that a different jury might find that evidence more convincing." *Ashe* v. *Swenson*, supra, 446.

The trial court's conclusion that no evidence should be excluded must, therefore, be reconsidered in light of the test we have articulated today. That test clearly indicates that the state may not introduce Coleman's testimony that the defendant requested, on the night before the murder took place, that Coleman kill her mother. The jury in the first trial demonstrably harbored a reasonable doubt as to the truth of that alleged fact and, if that fact were found to be proven beyond a reasonable doubt by the jury in the second trial, it would establish an element of the charged offense of conspiracy and could, therefore, form the basis of a conviction. With respect to other facts that the state may seek to prove, it would not be appropriate, on the present record, for us to anticipate evidentiary rulings on retrial. The trial court must exclude evidence offered in the first trial if (1) it can be demonstrated that the jury, in acquitting the defendant of the accessory count

[11] The state, noting that accessorial liability is in most cases based on physical acts, contends that the jury may have believed Coleman, "but nevertheless concluded that the defendant's verbal acts did not rise to the level of accessorial liability needed for conviction of murder." Inasmuch as four of the five accessorial acts specified in General Statutes § 53a-8—soliciting, requesting, commanding, or importuning—are necessarily verbal acts, we think that the jury could not have reached such a conclusion without disobeying its instructions and nullifying the statute.

in the first trial, harbored a reasonable doubt as to the truth of the fact sought to be proven, and (2) the alleged fact, if proven, would establish an element of the offense of conspiracy and could, therefore, form the basis of a conviction on that count.

The decision of the trial court is affirmed in part and reversed in part, and the case is remanded to the trial court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.